

## Written evidence from Dr Stuart Wallace (COV0087)

- Dr Stuart Wallace, Lecturer in International Human Rights Law and Constitutional Law at the University of Leeds.
- Expert on the application of the European Convention on Human Rights, particularly the right to life and its obligations to protect and investigate.
- Author of the [Application of the European Convention on Human Rights to Military Operations](#) published by Cambridge University Press.

### Reason for Submission

The UK has been criticised for not providing adequate personal protective equipment to NHS staff and care workers during the covid-19 pandemic. I am submitting this evidence to outline the legal obligations the State has to investigate these apparent failures to provide PPE promptly and to raise concerns about possible forthcoming breaches of the obligation to investigate.

### Executive Summary

- The UK must investigate apparent failures to provide adequate PPE to care workers and NHS staff promptly under human rights law.
- Inquests may not satisfy the State's obligation to investigate on their own.
- The extenuating circumstances will not significantly reduce or alter the State's obligation to investigate.

### Introduction

1. Under Article 2 of the European Convention on Human Rights (given effect in domestic law via the Human Rights Act 1998), the State has an obligation to protect people within its jurisdiction from avoidable loss of life resulting from any activity, whether public or not, in which the right to life may be at stake.<sup>1</sup> The obligation arises where the authorities knew, or ought to know, of a real and immediate risk to the life of a person and failed to take reasonable measures, within the scope of their powers, to avoid that risk.<sup>2</sup> This is applicable to

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<sup>1</sup> *Oneryildiz v Turkey* (2005) 41 EHRR 20 at [71].

care workers and NHS staff who are treating and caring for patients with suspected or confirmed Covid-19. Failure to provide adequate PPE increases the risk that staff will contract the infection and shortages of PPE could also mean that staff might expose other, non-Covid patients to the virus; engaging an obligation to protect them.

2. The State also has an obligation to put in place a legislative and administrative framework to provide effective deterrence against threats to the right to life.<sup>3</sup> This includes regulation of hospitals, whether public or private, to protect patients' lives. This regulatory system must function correctly, including measures for supervision and enforcement.<sup>4</sup> The State has an obligation to investigate potential violations of the right to life, the purpose of the obligation to investigate is to secure the effective implementation of the domestic regulations safeguarding the right to life and, in cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.<sup>5</sup> Thus, if there is an arguable case that the State has failed to take adequate measures to protect frontline staff from Covid-19 by failing to provide adequate PPE, human rights law demands that the State investigate why this has occurred. The obligation to investigate under the right to life is free-standing and distinct from the question of whether the State is culpable for failing to provide adequate PPE.<sup>6</sup> It may be difficult to establish State liability for this,<sup>7</sup> but the obligation to investigate remains regardless.

### **Standards of investigation**

3. The authorities must act of their own volition in investigating once a death or life-threatening injury is brought to their attention.<sup>8</sup> Those investigating must be institutionally, hierarchically and practically independent from those under investigation.<sup>9</sup> The form of the investigation may vary,<sup>10</sup> but it must be effective i.e. capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible.<sup>11</sup> The

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<sup>2</sup> *Osman v United Kingdom* (2000) 29 EHRR 245 at [116].

<sup>3</sup> *Kolyadenko v Russia* (2013) 56 EHRR 2 at [157].

<sup>4</sup> *De Sousa v Portugal* (2018) 66 EHRR 28.

<sup>5</sup> *Nachova v Bulgaria* (2006) 42 EHRR 43 at [110].

<sup>6</sup> *Silih v Slovenia* (2009) 49 EHRR 37 at [159].

<sup>7</sup> Stuart Wallace, *The Application of The European Convention on Human Rights to Military Operations* (Cambridge University Press, 2019) 98-107.

<sup>8</sup> *Ergi v Turkey* (2001) 32 EHRR 18 at [82].

<sup>9</sup> *Jordan v United Kingdom* (2003) 37 EHRR 2 at [106].

<sup>10</sup> *Kelly and Others v United Kingdom* (App No 30054/96) ECtHR 4 May 2001.

authorities are obliged to take ‘reasonable steps available to them’ to secure evidence e.g. witness statements, forensic evidence, autopsy, records of injury etc.<sup>12</sup> The investigation must be carried out expeditiously and the next of kin must be involved to the ‘extent necessary to safeguard their interests’.<sup>13</sup> There must be sufficient public scrutiny of the investigation or its results, although the scope of this obligation will vary from case to case.<sup>14</sup>

### **Investigation issues related to pandemic**

4. The State’s obligation to investigate potential violations of the right to life as a result of PPE shortages will likely need to be discharged by a combination of measures e.g. inquests to determine the facts of individual deaths and a wider investigation into issues of government policy concerning procurement and distribution. A combination of investigation types can satisfy the obligation to investigate.<sup>15</sup>
5. While inquests normally play a big role in discharging the obligation to investigate in England, Wales and Northern Ireland, there are several indications that their investigations into Covid-19 issues will be limited. This will likely lead to investigatory gaps and violations of the obligation to investigate.
6. Firstly, the Chief Coroner has discouraged the referral of deaths related to Covid-19 to coroners. Covid-19 is classified as a “naturally occurring disease”, thus someone dying from it is not “unnatural” and should not trigger investigation by a coroner.<sup>16</sup> The Chief Coroner’s guidance states “The aim of the system should be that every death from COVID-19 which does not in law require referral to the coroner should be dealt with via the [Medical Certificate of Cause of Death] process”. Most deaths related to Covid-19 will be dealt with through these very cursory investigations.
7. Coroners will still have a role to play in investigating deaths where a person has contracted Covid-19 while in State detention<sup>17</sup> and where the death is related to the deceased’s employment.<sup>18</sup> Preventable deaths that result from a failure to provide adequate PPE should

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<sup>11</sup> *Ogur v Turkey* (2001) 31 EHRR 40 at [88].

<sup>12</sup> *Edwards v United Kingdom* (2002) 35 EHRR 19 at [71].

<sup>13</sup> *Ibid* at [73].

<sup>14</sup> *Slimani v France* (2006) 43 EHRR 49 at [32].

<sup>15</sup> Stuart Wallace, *The Application of The European Convention on Human Rights to Military Operations* (Cambridge University Press, 2019) 118

<sup>16</sup> <https://www.judiciary.uk/wp-content/uploads/2020/04/Chief-Coroners-Guidance-No-37-28.04.20.pdf>

<sup>17</sup> s.1(2)(c) Coroners and Justice Act 2009.

<sup>18</sup> Notification of Deaths Regulations 2019/1112 issued under s.18 Coroners and Justice Act 2009.

not be classified as “natural deaths”. Yet, further policy guidance seems to discourage coroners from exploring links between inadequate PPE and death. Guidance from late April 2020 emphasised that the duty to investigate further in occupational death cases is not engaged where “there is no reason to suspect that any culpable human failure contributed to the particular death”.<sup>19</sup> The Chief Coroner stressed that “an inquest is not the right forum for addressing concerns about high-level government or public policy” specifically mentioning issues related to procurement of PPE.<sup>20</sup> The scope of the investigations undertaken by coroners will clearly be limited and need to be made up through some other means e.g. a public inquiry. It is also possible that the Chief Coroner’s advice will discourage investigations in borderline cases.

### *Speed*

8. States are obliged to carry out investigations expeditiously. This requirement may be breached for existing inquests, which have been deferred,<sup>21</sup> and future inquests as a backlog develops. Where investigations into deaths related to employment and PPE shortages are undertaken they will also be delayed as coroners are encouraged to “suspend the investigation until it becomes clear how such enquiries can best be pursued”.<sup>22</sup> If an alternative investigation is not undertaken swiftly, violations of Article 2 are likely to follow. Delays to investigations are sufficient in themselves to breach Article 2.

### *Effectiveness*

9. The current circumstances may also impact the effectiveness of investigations. There may be inadequate evidence gathering due to a lack of availability of routine post-mortem examinations, pathologists, mortuary and body storage facilities and where testing to confirm Covid-19 has not been carried out. The Chief Coroner’s policy choices may also be indicative of a lack of impartiality with respect to deaths resulting from inadequate PPE.

## **Concessions for the unusual circumstances?**

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<sup>19</sup> <https://www.judiciary.uk/wp-content/uploads/2020/04/Chief-Coroners-Guidance-No-37-28.04.20.pdf>

<sup>20</sup> <https://www.judiciary.uk/wp-content/uploads/2020/04/Chief-Coroners-Guidance-No-37-28.04.20.pdf>

<sup>21</sup> [https://www.judiciary.uk/wp-content/uploads/2020/03/Chief-Coroner-Guidance-No.-34-COVID-19\\_26\\_March\\_2020-.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/Chief-Coroner-Guidance-No.-34-COVID-19_26_March_2020-.pdf)

<sup>22</sup> <https://www.judiciary.uk/wp-content/uploads/2020/04/Chief-Coroners-Guidance-No-37-28.04.20.pdf>

10. The European Court of Human Rights has stated it does not want to impose an impossible burden on States, by analogy the Court has observed

‘where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and [...] concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed’.<sup>23</sup>

11. Despite this apparent acceptance of lower standards of investigation, the actual leeway granted to States in practice for exceptional circumstances has been limited. The Court is increasingly prescriptive about the measures required to discharge the obligation to investigate finding violations for very specific shortcomings.<sup>24</sup> Furthermore, resource constraints have not been commonly accepted as a valid excuse for failures to uphold human rights standards.<sup>25</sup> Therefore the government should not assume that the current circumstances would alter the obligation to carry out a prompt and thorough investigation.

*4/05/2020*

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<sup>23</sup> *Al-Skeini and Others v United Kingdom* (2011) 53 EHRR 18 at [164].

<sup>24</sup> Stuart Wallace, *The Application of The European Convention on Human Rights to Military Operations* (Cambridge University Press, 2019) 129-130

<sup>25</sup> *Burdov v Russia* (2009) 49 EHRR 2.